

State Contracts and Risk Assessment



Risk Assessment
Why? When? How?

Why?

- **All human activities pose risk.**
- **When the State enters into a contract for the purchase of products or services, there ordinarily are some risks associated with that contractual relationship.**
- **Required by law.**

Purpose

- **Protect the State, its employees and property.**
- **Avoid unexpected monetary obligations.**
- **Protect the public.**

Examples

- **Product or service does not perform as expected. Loss of State monies.**
- **Damage to State property.**
- **Injury to State employees.**
- **Injury or property damage to the public.**
- **Lawsuits brought against the State by third parties.**

When?

- **Before the contractual relationship is established.**
- **Before drafting or reviewing contractual language.**
- **Before soliciting bids or issuing an RFP.**
- **Before deciding to purchase goods or services; assessment may result in alternative approach.**

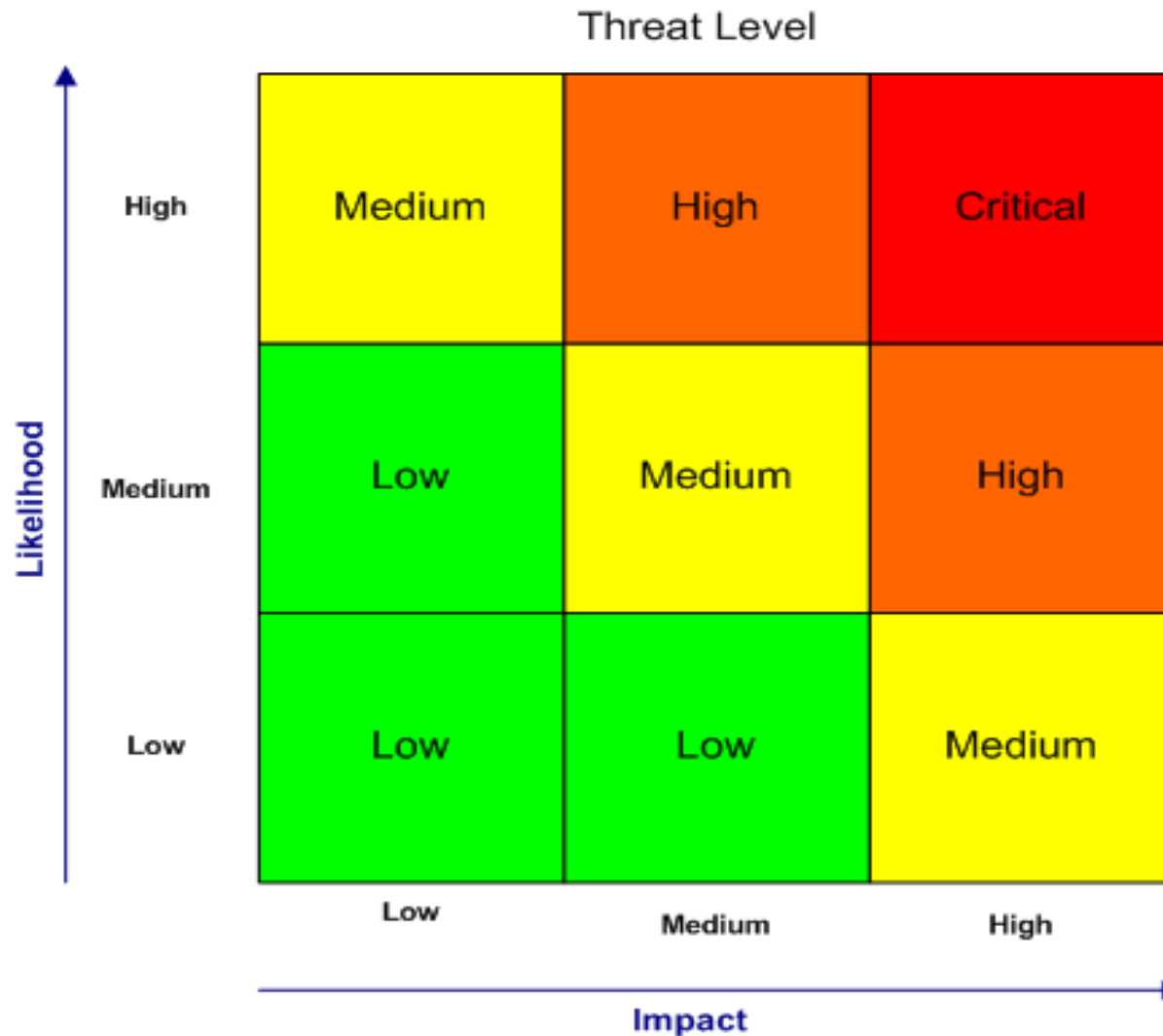
Relationship to Procurement

- **Risk transfer provisions impact vendor product and service pricing.**
- **Substantive modifications to risk transfer provisions may not be allowed after bid solicitation.**
- **Vendor challenges.**

How?

- Risk assessment is both a factual and legal inquiry.
- Involve end users of products and services.
- Understand how products will be used and how services will be provided.
- Identify potential consequences of defective product; mishaps in the provision of services.
- Gauge the likelihood of negative consequences.

Risk matrix



Basic Inquiries

- What types of accidents or losses could occur?
- What is the worst case scenario?
- Is the product an “off the shelf” product or a unique product produced especially for the State?
- Is the product or activity inherently or potentially dangerous?
- Who has responsibility to implement and maintain safety measures?
- Does the anticipated contractor services involve work that ordinarily is performed by employees?
- Is the relationship similar to a temporary employee relationship?
- Is the anticipated contractor a large company, small business or a sole proprietor?
- Does the relationship involve the provision of professional services?
- Will any services be performed on-site?
- Will there be driving involved in performance of the contract?

Legal Considerations

- **Likelihood and nature of third-party claims. (How and why could the State be sued)**
- **Direct liability**
 - Retained control
 - Non-delegable duties
 - Inherently dangerous activities
- **Vicarious liability**
 - Special relationship
 - Independent contractor status
 - Use of State equipment or facilities

Legal Considerations

- **Out of State activities.**
 - **Joint and several liability.**
 - **Comity and the Statutory Caps.**
 - **Expense of defending lawsuits in other jurisdictions.**

Risk Transfer Provisions

- **Indemnification and Hold Harmless Clause.**
- **Contractually required insurance.**
- **Additional Insured status.**

Risk Management Manual contains guidelines and sample language.

Indemnification

- **Ordinarily may require indemnification only for vicarious liability.**
 - ▶ **Endorsement as an additional insured or equivalent form of protection is statutorily required in contracts for services.**
- **Broad indemnification requires approval of Director of OMB and Attorney General.**
 - ▶ **Appropriate where risk of loss is high but State retains little or no means of controlling the risk.**

Contracts with Political Subdivisions

- **Indemnification agreements prohibited.**
- **Additional insured status may be an option in narrow circumstances.**
- **Contractors for political subdivision can be required to indemnify the State.**

Limitation of Liability

- **State may ordinarily only agree to limit the liability of a vendor for certain goods and services. Only indirect consequential damages may be waived. N.D.C.C. 32-12.2-15.**
- **Anticipate vendor requests to limit their potential liability to the State and evaluate before RFP goes out.**

Resources

- **Attorney General's Office.**
- **State Procurement Office.**
- **Risk Management.**



Questions?

Thank you

